LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR - 6 1952
CHARLES ELMORE CROPLEY
CLERK

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:	Page
Alcoa S. S. Co. v. *Elmhurst Contracting Co.*, 61 F. Supp. 6, 11	11
Atlas, The, 93 U. S. 302	1, 7
Carib Prince, The, 170 U. S. 655	4
Chattahoochee, The, 173 U. S. 540	7
Fogarty v. *United States*, 340 U. S. 8, 13	8
Great Lakes Transit Corp. v. *Interstate S. S. Corp.*, 301 U. S. 646	2
Hellenic Lines Ltd. v. *American Tobacco Co.*, 1949 A. M. C. 607 (not officially reported)	11
Irrawaddy, The, 171 U. S. 187	4
Jason, The, 225 U. S. 32	4, 5
Leeds Shipping Co. v. *Duncan*, 37 Com. Cas. 213, 42 Lloyd's List Law Rep. 123	11
Mandu, The, 102 F. 2d 459, 114 F. 2d 361, cert. den. 311 U. S. 715	7
Queen Ins. Co. v. *Globe Ins. Co.*, 263 U. S. 487	8

Statutes:	
Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C. 1301, *et seq.*):	2, 3, 8
Section 3	6, 7, 11
Section 3(8)	6, 11, 12
Section 4(2)	4, 5, 11, 12
Section 4(2)(a)	4
Section 4(3)	10, 11, 12
Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. 190-195):	2, 3, 4, 5, 7
Section 3	3, 5, 7
Brussels Convention of 1924 (Hague Rules), U. S. Treaty Series No. 931, 51 Stat. 233, ratified, 51 Stat. 246	3, 11

Miscellaneous:	
6 Benedict, *Admiralty* (6th ed.), pp. 155-160, supp. p. 50	3
Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 75th Cong., 3rd Sess., on an International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them, etc., Jan. 10, 11, 12, 13 and 14, 1938	9
H. Rep. No. 2218, 74th Cong., 2d Sess.:	11
International Maritime Committee Bulletin No. 57, London Conference, October 1922 (Antwerp 1923)	11
Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.)	3, 11
Ibid., (1937 ed.)	11
S. Rep. No. 742, 74th Cong., 1st Sess., pp. 3-4	3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 450

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

Respondents admit, as they must, that absent a "Both-to-Blame" clause, the rules of *The Atlas* and *The Chattachoochee* (discussed at pp. 11-14 and 41-44 of our main brief), taken together, result "in a shifting of the 'burden' of a part of the cargo loss to the carrier." (Resp. Br., p. 16; see also p. 3). In other words, there is no dispute, and there can be no dispute, that under the decision below the carrier is ultimately responsible for part (normally one-half) of its cargo's damage. This is so, notwithstanding the fact that the statutory policy of the United States, in force for nearly sixty years, is to exonerate the carrier from all responsibility for cargo damage where, as here, the carrier's sole "fault" is what is imputed to it by

law in respect of errors of navigation, by the Master or his employees on the ship.

Respondents' basic position is that it is unreasonable for an ocean carrier to protect itself by contract against the indirect imposition of a liability which could not be imposed directly. They seek to support this position by a niggardly view of the policy of the Harter and Carriage of Goods by Sea Acts, and by efforts to obscure the true economic facts by characterizing the liability which the carrier is required to bear by the decision below as somehow different in kind from the liability which Congress has said the carrier shall not bear.[1]

A. Respondents read the Harter and Carriage of Goods by Sea Acts as being restricted to merely forbidding a particular cause or form of action. They speak of the Act as concerned only with "liability *to the cargo owner*" (emphasis that of respondents') and emphasize that "There is no pleading in either case on which cargo owners or their insurers could possibly be awarded any recovery from the carrier." (Br., p. 17). Respondents seek to support this restrictive, narrow reading of the Acts by implied criticism of the

---

[1] Most of the arguments of characterization are anticipated and dealt with at p. 44 in our main brief. In particular we emphasize again the decision of this Court in *Great Lakes Transit Corp.* v. *Interlakes S. S. Co.*, 301 U. S. 646 which respondents make no genuine effort to discuss (see Respondents' brief p. 15). That case, although involving different facts from those here presented, clearly establishes the following propositions: (a) a liability for "cargo damages" does not lose its character as such because it is asserted indirectly through another vessel; (b) this Court will not allow procedural incidents and matters of characterization to obscure or defeat substantive rights. Those principles have as much relevance here as they did in the *Great Lakes* case.

legislative policy; thus they refer to the immunity conferred by Congress as a "special privilege" (Resp. Br., pp. 19, 20), which they characterize as "a legal 'anomaly'" (*id.*, p. 19) granted "in derogation of common law liability" (*id.*, p. 27).

This attempt of respondents to invoke the discredited doctrine that statutes in asserted derogation of common law should, so far as possible, be ignored, is, we believe, crucial to their position. The immunity given ocean carriers by Section 3 of the Harter Act is not a freak; it arose out of a deliberate legislative policy of redistributing the risks of ocean transport between cargo and carrier, deriving evidently from a desire to encourage American investment and enlarged activity in shipping. (See Pet. Br., pp. 14-22). The statutory immunity, and the policy underlying it, have been established without question for nearly sixty years, and were reaffirmed by Congress in the Carriage of Goods by Sea Act of 1936; they have won general adoption by all the important maritime countries of the world.[2]

---

[2] The Brussels Convention of 1924, referred to at p. 19 of our main brief, is adhered to by Belgium, Denmark, Egypt, Finland, France, Algeria, Germany, Great Britain and Northern Ireland (including British colonies, territories and mandates), Hungary, Italy, Monaco, Norway, Poland, Portugal, Rumania, Spain, Sweden, and the United States. (See Knauth, *Uniform Bills of Lading* (1947 ed.), p. 74). Chile, Estonia, Japan and Jugoslavia signed but have not ratified the convention. Implementing legislation has been enacted by many of the foregoing countries and also, on an optional basis, by The Netherlands. See Knauth, *Uniform Bills of Lading* (1947 ed.) pp. 67, 74; 6 Benedict, *Admiralty* (6th ed.) pp. 155-160, supp. p. 50.

The statement, at p. 19 of our main brief, that the convention was signed by twenty-four nations is in error. It is adhered to by seventeen; four other signatories have not ratified it.

Respondents' attack is made basically not against the Both-to-Blame clause but rather against Section 3 of the Harter Act and 4 (2)(a) of the Carriage of Goods by Sea Act. Indeed, their insistence that those provisions be read as narrowly as possible contains an implicit concession that the Both-to-Blame clause is thoroughly consistent with the statutory provisions when fairly read.

In connection with the foregoing we must stress again that the issue here is not whether the Acts of their own force require the result for which we contend. It is rather whether the Acts declare a legislative policy which the courts, in passing on the reasonableness of bill of lading provisions, should respect and endeavor to effectuate. Thus respondents expose the fallacy in their argument for "strict construction" by citing *The Carib Prince*, 170 U. S. 655 and *The Irrawaddy*, 171 U. S. 187 (Br., p. 27). Both these cases dealt with the rights of the parties *in the absence of contract*, not with whether a contract could be enforced. In *The Carib Prince* this Court recognized that the shipowners may under the Harter Act contract against warranty of seaworthiness (preserving "due diligence"). *The Jason*, 225 U. S. 32, reached a result contrary to what had been held in *The Irrawaddy* because an appropriate contract had been made consistent with the policy of the Harter Act.

We believe that Congress has firmly expressed such a policy and that the legislative policy should be given ungrudging support and effect. That the legislative policy is concerned with much more than merely cutting off direct recovery by the shipper from the carrier is clear. Congress did not merely foreclose a particular

cause of action; it declared that "neither the carrier nor the ship shall be responsible" for cargo damage. Carriage of Goods by Sea Act, Section 4 (2); *cf.* Harter Act, Section 3. That language is clearly broad enough to cover, as between a carrier and its cargo, any imposition of responsibility on the carrier for cargo damage, whether made directly or by indirect means. And the courts, in considering the effect of the statutory policy on bill of lading provisions, have not limited its effect to suits for damage by cargo against carrier. Thus, in *The Jason*, 225 U. S. 32, this Court did not limit Section 3 of the Harter Act to a defense against suits by cargo for damages, but held that the policy of that section supported contracts, theretofore invalid, enabling the shipowner to recover general average contribution from cargo. It reached this result on the ground that the contract provided for such recovery "only under circumstances where by the act [the shipowner] is relieved from responsibility" (225 U. S. at 55).

The consistent purpose of Congress has been to relieve the shipowner from the economic burden of damage to cargo caused by errors of navigation imputable against the shipowner. Under the decision below, the shipowner is made to bear a substantial part of that burden. The clause here in issue designed to eliminate that incongruous result must, we think, be regarded as implementing, and not frustrating, the legislative policy.

B. Respondents argue, however, that the Harter Act merely confers an immunity, while the "Both-to-Blame" clause creates an indemnity. (Resp. Br., p. 21). They say that by the clause cargo is required to "shoulder the burden of the shipowner's tort liability

to another vessel-owner" (Resp. Br., p. 22). By way of *reductio ad absurdum* they suggest that the arguments advanced to support the clause would lead to sustaining provisions requiring cargo to indemnify the shipowner for his entire liability to the non-carrying vessel, or for his own hull damage. (Resp. Br., p. 23).

This ignores the fact that the clause, by its very terms (Pet. Br., p. 51), is designed merely to enable the carrier to recoup, from cargo, that part of the damages recovered by cargo which has come (although circuitously) out of the carrier's pocket. The only obligation which the clause imposes on cargo is that it refund to its carrier such part of cargo's recovery as has been charged back against its own carrier.

In other words, the practical effect is the same as if the District Court had simply decreed that cargo should recover a part only of its damages from the "*Esso Belgium*" and that no part of that recovery could lawfully be charged against the "*Nathaniel Bacon.*"

This result is fully consistent with the carrier's relief from responsibility provided for in the statutes.[3]

---

[3] That Congress had no intention of distinguishing between clauses directly relieving a carrier of liability, and those achieving that result indirectly by indemnity or otherwise, is made abundantly clear by Section 3 (8) of the Carriage of Goods by Sea Act. A benefit of insurance clause—which Congress there declared "shall be deemed to be a clause relieving the carrier of liability"—afforded a means by which the carrier, having paid a liability, could indemnify itself from cargo insurers, thus ultimately relieving itself of that liability. Congress limited its prohibition of such clauses, to cases in which the liability sought to be avoided arose from breach of the duties specified in Section 3 of the Act (see p. 24 n. 13 of our main Brief).

Respondents contend, however, that the clause is objectionable as depriving "innocent parties of full compensation" (Resp. Br., p. 18). But cargo is no less "innocent" in cases in which the other vessel is free of fault; yet Congress has declared that in such case cargo shall get no compensation whatever for damage arising from errors of navigation by the carrier's servants,[4] allowing cargo to recover from its carrier only where unseaworthiness or other fault directly chargeable against the carrier causes the loss. The intended effect of Section 3 of the Harter Act is to deny recovery to "innocent" cargo in the situations to which it is applicable; the policy of Congress is that cargo may be compensated only to the extent that the economic burden of cargo's loss is not imposed on its own carrier. It is presumably for this reason that respondents have found it necessary to suggest that the rule of *The Chattahoochee*, 173 U. S. 540, should be abolished (Resp. Br., p. 20).

Respondents' argument that it is unreasonable, by contract, to limit cargo to less than a full recovery in a both-to-blame situation must be considered in the light of the fact that under the law of most maritime nations cargo's recovery is thus limited. Our courts have not hesitated to apply such law in appropriate cases notwithstanding "public policy" arguments similar to those made by respondents. See *The Mandu*, 102 F. 2d 459, 114 F. 2d 361, cert. den. 311 U. S. 715.

---

[4] To that extent Congress clearly modified the rule of *The Atlas* (See Resp. Br., p. 20), for *The Atlas* had said that cargo could recover in full from either its own carrier or the non-carrier 93 U. S. 302, 315, 317. The Harter Act removed the first alternative.

The "Both-to-Blame" clause is "an indemnity clause known nowhere else" (Resp. Br., p. 34) because it is only under the law of the United States that (absent such a clause) the *carrier's* responsibility for damage suffered by its cargo is greater in a both-to-blame situation than it is where the carrier is held to be solely at fault. A clause designed to eliminate that anomalous result promotes, and does not defeat, the objective of the Carriage of Goods by Sea Act of furthering international uniformity. This Court has long recognized the "special reasons" for maintaining uniformity with the law of other nations in commercial maritime matters. *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493.

II

Respondents argue that the "Both-to-Blame" clause is an attempt to establish the principles of the Collision Convention of 1910, which was signed on behalf of the United States but never ratified by the Senate. (Resp. Br., pp. 36-38). They seek to suggest that the failure of the Senate to ratify that convention implies a legislative disapproval of the "Both-to-Blame" clause. (Resp. Br., p. 20, n. 11).

Even passing the point that inaction by the Senate in 1938 cannot affect what Congress did in 1893 and 1936 (*cf. Fogarty* v. *United States*, 340 U. S. 8, 13), no inference adverse to our position can conceivably be drawn from the failure of the Senate to ratify the Convention. The Convention would, it is true, have eliminated the problem that gave rise to the "Both-to-Blame" clause; but it would also have changed our law in a number of other respects, many of which were

strenuously objected to by various affected interests, including not only cargo but also shipowners, seamen and pilots. See Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 75th Cong., 3d Sess., on an International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them, etc., Jan. 10, 11, 12, 13 and 14, 1938.[5] One of the principal grounds of opposition to ratification was that the Convention would not apply in cases in which both vessels and all claimants were American nationals, and its adoption in advance of national legislation would produce confusion and lack of uniformity in American law. (*E.g.*, testimony of Mr. Ira A. Campbell, Hearings, pp. 186-188, 198-199; remarks of Senator Schwellenbach, *id.* pp. 243, 249, 254-255).[6]

---

[5] The principal changes which would have been made by the Convention were: (a) adoption of the rule, as between colliding vessels, of proportionate liability based on degree of fault (Art. 4), (b) allowing cargo to recover from each vessel only an amount proportionate to that vessel's fault (Art. 4), (c) abolition of legal presumptions of fault on the part of colliding vessels (Art. 6), (d) placing a two-year statute of limitations on all damage claims arising out of a collision (Art. 7). The text of the Convention is set out at Hearings, pp. 8-11.

[6] Mr. Campbell, on behalf of the American Steamship Owners' Association, testified at length against ratification (Hearings, pp. 176-304). In addition to the point mentioned in the text, he expressed objection to, or doubt, about many of the substantive features of the Convention, including the proportionate fault rule (e.g., Hearings, pp. 181-193, 212-215) and the abolition of presumptions of fault (e.g., Hearings, pp. 178-180).

The American Steamship Owners' Association, through Mr. Campbell and Mr. Cletus Keating, had been the principal opponents of the Englar amendment to the Carriage of Goods by Sea Act, designed to outlaw the "Both-to-Blame" clause. (See Pet. Br., pp. 27-28).

It should be noted that respondents are disingenuous in suggesting that cargo's position under the "Both-to-Blame" clause is worse than under the Collision Convention because under the clause cargo is "subjected to a potential and uncertain liability which may hang over his head for many years." (Resp. Br., p. 34). Such part of cargo's recovery as the non-carrier is made to bear (one-half unless the parties stipulate otherwise) is subject to no contingency whatever. Under the Collision Convention such a partial recovery is all that cargo would get.[7] The only uncertainty under the "Both-to-Blame" clause is whether cargo will be able to benefit from the hazards of litigation and keep more than that. Such delays as necessarily attend court determination of any litigated issue, whether under both-to-blame situations or any others, have no relevancy as to validity of the clause.

III

Respondents' argument that the "Both-to-Blame" clause is specifically prohibited by Section 4 (3) of the Carriage of Goods by Sea Act (Resp. Br., pp. 39-43) would prove too much. They assert that Section 4 (3) is "the capstone of the structure of the Act" (Resp. Br., p. 39)—a surprising assertion in view of the complete lack of any mention of the section in the Com-

[7] The Collision Convention applies the rule of damage proportionate to degree of fault, in place of the equal division as under American law, but the difference should work in cargo's favor as often as it works against it.

mittee Reports on the Act[8]; and the complete absence, so far as our research shows, of any judicial decision purporting to apply or enforce it.[9] They also say that its purpose was "to forestall the ingenuity of carriers in drafting and inserting in bills of lading oppressive clauses" (Resp. Br., p. 39). This purpose, we had supposed, was dealt with primarily by Section 3 (8), which is expressly concerned with "any clause, covenant, or agreement in a contract of carriage" and which invalidates any such clause relieving the carrier from liability for loss or damage arising from neglect, fault, or failure in the duties specified in Section 3 of the Act. Respondents argument would render meaningless

---

[8] See Sen. Rep. 742, 74th Cong., 1st Sess.; House Rep. 2218, 74th Cong., 2d Sess. In particular, the House Report, in a two and one-half page summary of the "benefits" of the Act made no reference to the section. (H. Rep. *supra*, pp. 6-9).

The language of Section 4 (3) was taken without change from the Brussels Convention of 1924, which in turn took it from the so-called "Hague Rules" approved in 1921 by the International Maritime Committee, as revised at the 1922 meeting of that Committee. See Knauth, *Ocean Bills of Lading* (1927) pp. 114-116. The brief discussions of Section 4 (3) at the 1922 Conference (International Maritime Committee Bulletin No. 37, London Conference, Oct. 1922 (Antwerp, 1923) pp. 457-458, 475-481) from which respondents have quoted one statement (Resp. Br., p. 40) indicate that the section was designed by its drafters to give shippers exemptions from liability for damage caused by cargo comparable to those which Section 4 (2) gave the carrier from liability for damage caused by the carrier. (See especially pp. 457, 479-480).

[9] This section has been held inapplicable to demurrage clauses. See *Alcoa S. S. Co.* v. *Elmhurst Contracting Co. Inc.*, 61 F. Supp. 6, 11; *Hellenic Lines, Ltd.* v. *American Tobacco Co.*, 1949 A. M. C. 607 (not officially reported); *Leeds Shipping Co.* v. *Duncan*, 37 Com. Cas. 213, 42 Lloyd's List Law Rep. 123, 128.

this careful limitation of the scope of the prohibition contained in Section 3 (8). As we have seen, those duties which Section 3 (8) forbids a carrier to avoid by contract do not include any duty to cargo respecting errors and faults of navigation, which are, indeed, the subject of an express immunity conferred by Section 4 (2) (Main Brief, pp. 22-23, 33).

A contract, like the *Jason* clause or the "Both-to-Blame" clause, which is designed to implement and make effective that immunity, is clearly not prohibited by the Act.[10]

The discussions attending the drafting of Section 4 (3) clearly indicate that said section was not intended to foreclose freedom of contract.

Respondents further suggest that "if the provisions of Section 4 (3) are not broad enough to nullify the Both-to-Blame clause, it is only because human language is inadequate to produce that result" (Resp. Br., p. 40). That language could easily be so drafted is shown by the amendment submitted by Mr. Englar and rejected by both committees (Pet. Br., p. 27). The language of that amendment emphasizes the lack of purpose and the inadequacy of Section 4 (3) as enacted to achieve the result for which respondents contend.

---

[10] Significantly, respondents appear to have abandoned here the contention they urged below that Section 3 (8) invalidated the Both-to-Blame clause.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

JAMES L. MORRISSON,
Special Assistant to the Attorney General

SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

BURLINGHAM, VEEDER, CLARK & HUPPER,
ROSCOE H. HUPPER,
RAY ROOD ALLEN,
BENJAMIN E. HALLER,
Of Counsel.

MARCH 1952.